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this Memorandum Decision shall not be  
regarded as precedent or cited before  
any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the case.

APPELLANT PRO SE:

**MICHAEL BALDWIN**  
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

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Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL BALDWIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0612-CR-1089
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Robert R. Altice, Judge  
The Honorable Amy J. Barbar, Magistrate  
Cause No. 49G02-0005-CF-75685

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**May 2, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Pro-se Appellant-Defendant Michael Baldwin (“Baldwin”) appeals the denial of his second motion for permission to file a belated notice of appeal under Indiana Post-Conviction Rule 2(1) in order to challenge the aggregate thirty-year sentence imposed following his plea of guilty to Aggravated Battery<sup>1</sup> and Unlawful Possession of a Firearm by a Serious Violent Felon,<sup>2</sup> Class B felonies. We affirm.

## **Issue**

Baldwin raises a single issue for review: whether the trial court erroneously denied his motion for permission to file a belated appeal.

## **Facts and Procedural History**

On January 15, 2002, Baldwin pleaded guilty to Aggravated Battery and Unlawful Possession of a Firearm by a Serious Violent Felon, and the State dismissed charges of Attempted Murder, Resisting Law Enforcement, Carrying a Handgun Without a License, and Battery. According to the terms of the plea agreement, the State was to recommend a thirty-year sentence. The trial court accepted the plea agreement and, on February 13, 2002, sentenced Baldwin to twenty years for Aggravated Battery and ten years for Unlawful Possession, providing for an aggregate sentence of thirty years.

On June 23, 2005, Baldwin filed a pro-se petition for post-conviction relief. With leave of court, on July 21, 2005, Baldwin filed an amended petition for post-conviction relief. On September 6, 2005, Baldwin filed a Motion to Correct Erroneous Sentence, which was

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<sup>1</sup> Ind. Code § 35-42-2-1-5.

denied by the trial court with a notation that the appropriate avenue for relief was the pending post-conviction petition. On September 7, 2005, Baldwin filed another pro-se petition for post-conviction relief, which he amended with leave of court on October 6, 2005.

On December 23, 2005, Baldwin filed a pro-se motion to file a belated appeal. On January 3, 2006, the trial court denied Baldwin permission to file a belated appeal. He did not appeal the denial. On January 11, 2006, with leave of court, Baldwin filed an amended pro-se petition for post-conviction relief. Counsel was appointed to represent Baldwin in post-conviction proceedings, but later withdrew his representation with leave of court. The Case Chronology indicates that an amended post-conviction petition is pending.<sup>3</sup>

On October 19, 2006, Baldwin filed a second pro-se motion for permission to file a belated appeal. On October 20, 2006, the trial court denied Baldwin's motion. He now appeals.

### **Discussion and Decision**

Indiana Post Conviction Rule 2(1) permits a defendant to seek permission to file a belated appeal, and provides in part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

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<sup>2</sup> Ind. Code § 35-47-4-5.

<sup>3</sup> On November 28, 2006, Baldwin again moved to amend his petition for post-conviction relief. His Appendix does not include a copy of any of his petitions for post-conviction relief, some or all of which may have attempted to challenge his sentence.

Where, as here, a trial court does not conduct a hearing on a petition for permission to file a belated notice of appeal, we review a trial court's decision regarding the petition de novo. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). There are no set standards for defining delay and each case must be decided on its own facts. Cruite v. State, 853 N.E.2d 487, 489 (Ind. Ct. App. 2006), trans. denied. Factors to consider in deciding whether a defendant was without fault in the delay of filing the notice of appeal include the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay. Id.

Baldwin contends that he is entitled to challenge his sentence on direct appeal in reliance upon the decision of our Indiana Supreme Court in Collins v. State, 817 N.E.2d 230 (Ind. 2004). In that case, our Supreme Court clarified that a defendant who has pled guilty under an "open plea" must challenge a resulting sentence on direct appeal, if at all, and not by way of a petition for post-conviction relief. Id. at 233. The court further stated:

The fact that the trial court at a guilty plea hearing does not advise the defendant in an open plea situation that the defendant has the right to appeal the sentence to be imposed does not warrant an exception to the rule that sentencing claims must be raised on direct appeal. This is because Indiana Post-Conviction Rule 2 will generally be available to an individual in this situation. Post-Conviction Rule 2 permits an individual convicted after a trial or guilty plea who fails to file a timely notice of appeal to petition for permission to file a belated notice of appeal where the failure to file a timely notice of appeal is not the fault of the individual; and the individual is diligent in requesting permission to file a belated notice of appeal.

Id. Subsequently, in Perry v. State, we stressed that:

not every motion to file a belated appeal should be automatically granted by trial courts simply because Collins has been decided, especially if there is no indication that the defendant had previously made attempts to collaterally attack a sentence imposed following a guilty plea. A defendant seeking to file a belated appeal still must follow the prerequisites of Post-Conviction Rule 2(1) regarding lack of fault and diligence.

845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), trans. denied.

Baldwin has strenuously attempted to challenge his sentence with prolific filings in the trial court. However, he has failed to diligently pursue relief through appropriate means. Baldwin did not appeal from the trial court's denial of his first motion for permission to file a belated appeal, and is attempting to obtain a second bite of the apple by re-litigating an issue previously decided adversely to him and not challenged on appeal. Due to the principles of res judicata, he may not do so. Ford v. State, 755 N.E.2d 1138, 1145 (Ind. Ct. App. 2001), trans. denied. Moreover, although the post-conviction rules do not directly address successive motions for permission to file a belated appeal, it is clear that the rules are not designed to allow unlimited collateral challenges to a conviction or sentence. See Indiana Post-Conviction Rule 12 (providing that a successive petition for post-conviction relief may be filed only with leave of the appellate court).

Moreover, we observe that a defendant who pleads guilty is entitled to appeal and contest the merits of a trial court's sentencing decision only in cases where there is an open plea. Collins, 817 N.E.2d at 231. An "open plea" is one in which the sentence is not fixed by the plea agreement, but sentencing is left to the trial court's discretion. Brewer v. State, 830 N.E.2d 115, 118 (Ind. Ct. App. 2005), trans. denied.

Here, unlike the defendant in Collins, there was an agreement between the State and

Baldwin as to his sentence. The parties intended to condition the acceptance of the plea agreement upon the trial court's acceptance of the State's sentencing recommendation. A plea agreement is a contract, binding upon both parties when accepted by the trial court. Cox v. State, 850 N.E.2d 485, 489 (Ind. Ct. App. 2006). If the trial court accepts the prosecutor's recommendation, the court is bound by the sentencing terms contained in the agreement and further sentencing discretion of the trial court is foreclosed. Pannarale v. State, 638 N.E.2d 1247, 1248 (Ind. 1994). Hence, Baldwin is not entitled to an appeal to contest the merits of his sentence because the trial court accepted the State's sentencing recommendation and there was no open plea.

For the foregoing reasons, the trial court did not err in denying Baldwin permission to file a belated appeal under Post-Conviction Rule 2.

Affirmed.

SHARPNACK, J., and MAY, J., concur.